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No. ——

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

EXXON CORPORATION,
SOUTHERN UNION COMPANY,
UNICON PRODUCING COMPANY and
SOUTHLAND ROYALTY COMPANY,
Petitioners,

v.

JICARILLA APACHE TRIBE,
DONALD P. HODEL, Secretary of the
United States Department of the Interior,
and STATE OF NEW MEXICO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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38 pp

QUESTIONS PRESENTED

1. Whether the Secretary of Interior has a special fiduciary duty to interpret leases and pertinent regulations so as to maximize immediate oil and gas royalties to the Indian tribes, to the exclusion of all other considerations, where no statute or regulation specifically mandates such an obligation.

2. Whether a lower Federal Court can substitute its discretion for that of the Secretary of the Interior as to an established royalty accounting procedure, in contravention of the well-established standards for review of agency action and in violation of the Separation of Powers Doctrine.

3. Whether a new agency rule requiring dual accounting, which constitutes an abrupt departure from the Secretary of the Interior's prior interpretation of leases and pertinent agency regulations, can have retroactive effect.

4. Whether a lessee of an Indian oil and gas lease issued pursuant to the Indian Mineral Leasing Act of 1938 can be held liable in money damages for an underpayment of royalties based solely on an alleged breach of a fiduciary duty by the Secretary of the Interior to the lessor Indian tribe.

LIST OF PARTIES

The caption contains the names of all parties to the proceedings before the United States Court of Appeals for the Tenth Circuit.

Petitioner, Exxon Corporation, is a corporation organized under the laws of the State of New Jersey, whose principal place of business is in Delaware.

Exxon Corporation's affiliates and partially owned subsidiaries are listed in Appendix "A" attached to Exxon's Application for Extension of Time to File Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, which was filed in this Court on July 8, 1986.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
OPINIONS BELOW	1, 2
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2, 3, 4, 5
REASONS FOR GRANTING THE WRIT	6
I. In establishing a specific fiduciary duty on the part of the Secretary to always maximize royalties payable to the Indians, the Tenth Circuit fails to recognize the United States Supreme Court's mandate in *Mitchell II* that the contours of any fiduciary duty be clearly established by a statute or regulation	6, 7, 8, 9, 10
II. The Tenth Circuit's application of the principles set forth in *Mitchell I* and *Mitchell II* substantially and materially differ from the application given the same principles by the United States Claims Court	10, 11, 12, 13
III. The Tenth Circuit's standard of review of the Secretary's actions, which, to the exclusion of all other considerations, looks only at whether or not the Secretary maximized immediate royalties to the Indians, is contrary to the standard of review set forth in 5 U.S.C. § 706(2)(A), the standard of review enunciated by the United States Supreme Court in *Udall v. Tallman* and that enunciated in other Circuit Court cases	13, 14, 15, 16

TABLE OF CONTENTS—Continued

Page

IV. The Tenth Circuit's standard of review which considers only whether or not the Secretary maximized immediate royalties to the Indians should either be reversed or clarified because of its importance in the management of both public lands and Indian lands, and because it is inconsistent with the Secretary's long-standing interpretation of the pertinent regulations 17, 18

V. The Tenth Circuit's affirmation of the District Court's mandate requiring the Secretary to apply dual accounting, both prospectively and retroactively, violates the well-established rule enunciated in various Circuit Courts that such a change should have only prospective effect..... 18, 19, 20, 21

VI. The Tenth Circuit's affirmation of the District Court's review of the Secretary's action with respect to Petitioner Exxon, absent any administrative record with a reasoned analysis as to why dual accounting should or should not be applied to Petitioner Exxon, violates well-established principles of administrative law 21, 22, 23

VII. The Tenth Circuit has enunciated a standard of review which allows a court to substitute its discretion for that of an administrative agency in violation of the separation of powers doctrine.... 23, 24, 25, 26

VIII. The Tenth Circuit's decision to afford the Tribe a remedy against innocent lessees as a result of an alleged breach of trust by the Secretary is in direct conflict with the United States Supreme Court decision in *Nevada v. United States* 26, 27

IX. The Tenth Circuit's decision to impose liability upon innocent third parties is in direct conflict with a long-standing principle of equity which has been specifically recognized by this Court and other Circuit Courts of Appeal 27, 28, 29

CONCLUSION 29

TABLE OF AUTHORITIES

CASES: Page

Atchison, T. & S.F. R. Co. v. Wichita Board of Trade, 412 U.S. 800 (1973) 22
American Surety Co. v. First National Bank, 141 F.2d 411 (4th Cir. 1944) 28
Badderton v. Frances, 432 U.S. 416 (1977) 14
Baker v. United States, 613 F.2d 224 (9th Cir. 1980), cert. denied, 449 U.S. 932 (1980) 15
Blackfeet and Gros Ventre Tribes of Indians v. United States, 32 Ind. Cl. Comm. 65 (1973) 11
Buccaneer Point Estates, Inc. v. U.S., 729 F.2d 1297 (11th Cir. 1984) 20
Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (1962) 24
Chevron, U.S.A., Inc. v. Natural Resourses Defense Council, Inc., 104 S.Ct. 2778, 52 USLW 4845 (1984) 24, 25
Commissioner v. Idaho Power Co., 418 U.S. 1 (1974) 13
Continental Oil Co. v. United States, 184 F.2d 802 (9th Cir. 1950) 15, 20
International Union, United Automobile, Aerospace & Agricultural Implement Workers of America v. Brock, 783 F.2d 237 (D.C. Cir. 1986) 20, 21
Investment Co. Institute v. Camp, 401 U.S. 617 (1971) 15
Matter of Quantum Development Corp., 534 F.2d 532 (3rd Cir. 1975) 28
McDonald v. Watt, 653 F.2d 1035 (5th Cir. 1981) 20
Melluzzo v. Watt, 674 F.2d 819 (9th Cir. 1982) 15
Montana v. Blackfeet Tribe of Indians, 471 U.S. ——, 85 LE2d 753, 105 S. Ct. —— (1985) 9
Morris v. Andrus, 593 F.2d 851 (9th Cir. 1978) 15
Morton v. Ruiz, 415 U.S. 199 (1974) 18, 29
Motor Vehicle Manufacturer's Assoc. v. State Farm Mutual, 463 U.S. 29 (1983) 21, 22
Mountain States Telephone & Telegraph v. Pueblo of Santa Ana, 472 U.S. ——, 86 L.Ed.2d 168, 105 S.Ct. —— (1985) 14

TABLE OF AUTHORITIES—Continued

Page

Nance v. Environmental Protection Agency, 645 F.2d 701 (9th Cir. 1981) 12
Navajo Tribe of Indians v. United States, 9 Cl. Ct. 227 (1985) 12, 17
Navajo Tribe of Indians v. United States, 9 Cl. Ct. 336 (1986) 10, 11
Navajo Tribe v. United States, 610 F.2d 766 (Ct. Cl. 1979) 11
Nevada v. United States, 463 U.S. 110 (1983) 8, 26, 27
Pan American Petroleum Corp. v. Udall, 192 F. Supp. 626 (D.Cal. 1961) 17
Public Service Commission v. Havemeyer, 296 U.S. 506 (1936) 24
Ramstad v. Hodel, 756 F.2d 1279 (9th Cir. 1985) .. 15
Retail, Wholesale & Department Store Union v. NLRB, 466 F.2d 280 (D.C. Cir. 1972) 20
Schlude v. Commissioner, 372 U.S. 128 (1963) 10, 27
Securities and Exchange Commissioner v. Chenery Corp., 332 U.S. 194 (1947) 20, 23, 24, 26
Seminole Nation v. United States, 316 U.S. 286 (1942) 28
Stewart Capital Corp. v. Andrus, 701 F.2d 846 (10th Cir. 1983) 20
Supron Energy Corp., et al., 46 IBLA 181 (March 31, 1980) 19, 20, 21
Udall v. Tallman, 380 U.S. 1 (1965) 13, 14, 24
United States v. Coleman, 390 U.S. 599 (1968) 18
United States v. Dann, 470 U.S. ——, 84 L.Ed. 2d 28, 106 S.Ct. —— (1985) 28
United States v. Hopkins, 427 U.S. 123 (1976) 13
United States v. Mason, 412 U.S. 391 (1973) 11
United States v. Mitchell, 445 U.S. 535 (1980) 6, 7
United States v. Mitchell, 229 Cl. Ct. 9, 664 F.2d 265 (1981) 10
United States v. Mitchell, 463 U.S. 206 (1983) ... 6, 7, 8, 10
United States v. New York Telegraph Co., 326 U.S. 638 (1944) 24
United States v. Ohio Oil Co., 163 F.2d 633 (10th Cir. 1947) 16

TABLE OF AUTHORITIES—Continued

	Page
Wilkinson v. United States, 365 U.S. 399 (1961)	10, 27
Yankton Sioux Tribe v. United States, 623 F.2d 159 (Ct. Cl. 1980)	12
STATUTES AND REGULATIONS:	
5 U.S.C.S. § 706(2)(A) (1982)	13, 23
25 U.S.C.S. § 396a-g (1983)	2, 3, 7, 17
25 U.S.C.S. § 406(a) (1983)	7, 8
25 U.S.C.S. §§ 476-479 (1983)	25
28 U.S.C.S. § 1254(1) (1982)	2
28 U.S.C.S. § 1362 (1977)	3
43 U.S.C.S. § 1457 (1980)	25
25 C.F.R. § 211.13 (1983)	18, 25
30 C.F.R. § 221.50 (1981)	18, 25
LEGISLATIVE HISTORY:	
H.R. Rep. No. 1872, 75th Cong., 3rd Sess. (1938)	9
S. Rep. No. 2, 75th Cong., 3rd Sess. (1938)	9
S. Rep. No. 3, 75th Cong., 3rd Sess. (1938)	9
OTHER AUTHORITIES:	
Bogert, *Trusts & Trustees*, § 901 (2d ed. rev. 1982)	27
F. Cohen, *Cohen's Handbook of Federal Indian Law* (1982 ed.)	9, 25
C.J.S. *Trusts* § 9 (1955)	28
Restatement (Second) of Trusts § 326 (1959)	28
U.S. Office of Indian Affairs, Regulations and Instructions for Officers in Charge of Forests on Indian Reservations 4 (1911)	8

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner Exxon Corporation respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit on Rehearing *En Banc* entered on January 23, 1986, and supplemented on June 18, 1986.

OPINIONS BELOW

The *en banc* opinion of the Court of Appeals for the Tenth Circuit, filed January 23, 1986, is reported at 782 F.2d 855, and is reproduced in the Joint Appendix ("Jt. App.") hereto.[1] (Jt. App. 1a-14a). The June 18, 1986

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[1] A Joint Appendix has been filed on behalf of Petitioner Exxon Corporation, Unicon Producing Company and Southland Royalty Company.

supplement to the *en banc* opinion is not yet reported, but is reproduced in the Joint Appendix. (Jt. App. 18a-19a). The *en banc* opinion adopted the dissenting opinion of Judge Seymour in the three judge panel opinion of the Court of Appeals for the Tenth Circuit, filed February 24, 1984, reported at 728 F.2d 1555 (10th Cir. 1984), which is reproduced in Petitioners' Joint Appendix (Jt. App. 22a-66a), along with the opinion of the District Court for the District of New Mexico, reported in 479 F.Supp. 536 (D.N.M. 1979). (Jt. App. 104a-137a).

JURISDICTION

The per curiam opinion and judgment of the Court of Appeals for the Tenth Circuit on Rehearing *En Banc* was entered on January 23, 1986. Petitioner Exxon filed a timely Petition for Rehearing on February 6, 1986, which Petition was denied on April 15, 1986. On July 8, 1986, Associate Justice Byron White signed an order extending the time for filing this petition for certiorari to and including August 13, 1986. This Court's jurisdiction is invoked under 28 U.S.C.S. § 1254(1) (1982).

STATUTES AND REGULATIONS INVOLVED

25 U.S.C.S. §§ 396a-g (1983) (Indian Mineral Leasing Act of 1938) (Jt. App. 200a); 25 C.F.R. §§ 211.1-211.30 (1985) (Jt. App. 214a); 30 C.F.R. §§ 221.1-221.80 (1981) (Jt. App. 238a).

STATEMENT OF THE CASE

This action was commenced in May, 1975, by the Jicarilla Apache Tribe (the "Tribe") against the Petitioner Exxon Corporation ("Exxon"), and others,[2] includ-

[2] The other natural gas producers, who are also Petitioners in this case, are Unicon Producing Company ("Unicon"), formerly Supron Energy Corporation ("Supron"), formerly Southern Union Production Company ("SUPC"), and Southland Royalty Company ("Southland"), formerly Aztec Oil and Gas Co. ("Aztec"), hereinafter collectively referred to as "the other Producer Defendants". Unicon, Supron and Southland are each filing their own separate petition.

ing the Secretary of the Interior (the "Secretary") pursuant to 28 U.S.C.S. § 1362 (1977). The subject matter of this case involves oil and gas leases located on the Jicarilla Apache Reservation (the "Reservation") in Northwest New Mexico, issued since 1950 pursuant to the Indian Mineral Leasing Act of 1938 ("IMLA"), 25 U.S.C.S. § 396a-g (1983). In accordance with the IMLA and the lease terms, the determination of royalties are expressly subject to the rules and regulations promulgated by the Secretary. 25 U.S.C.S. § 396d. Petitioner Exxon Corporation ("Exxon") is a lessee under one of said leases ("Indian Leases").

This controversy concerns the liability of Exxon and other natural gas producers for the alleged underpayment of royalties of natural gas production from 1970 to the present. At all times material hereto, the natural gas produced had been sold at the wellhead by Exxon and the other producers to Southern Union Company (["Southern Union", formerly Southern Union Gas Company]. The natural gas is transported from the wellhead by Southern Union to the Lybrook Plant located near the Reservation, where entrained liquids such as butane, propane and natural gasoline are extracted from the gas stream and sold by the plant operator who retains the proceeds from the sale of the liquids. Exxon has never owned any interest in the Lybrook Plant and has never received any revenues from the sale of extracted liquids from the plant owner. At all times, Exxon was regularly billed for royalties by the USGS and its successor based on computations made in accordance with the Secretary's construction of the lease terms, regulations and accounting procedures.

The Tribe's Complaint alleged that Exxon and the other Producer Defendants had failed to properly pay royalties based on the "value" of the natural gas produced from oil and gas leases on the Reservation which had been issued in the early 1950's pursuant to the

IMLA. More specifically, the Tribe's claim was that Petitioner Exxon and the other Producer Defendants had not rendered a "dual accounting" by valuing the produced natural gas for royalty purposes based upon the higher of the BTU adjusted wellhead price as compared with the net realization price method which takes into account the value of liquid by-products and residue dry gas extracted from the gas stream by the Lybrook Plant.

Exxon denied the material allegations of the Tribe's Complaint, as amended, and alleged, inter alia, that there had not been a hearing or administrative determination by the Secretary as to the existence or non-existence of any claimed lease violations, including any underpayment of royalties to the Tribe.

The District Court entered judgment on November 5, 1979, holding that the Secretary had breached his fiduciary duty by not requiring Exxon and the other Producer Defendants to dually account, notwithstanding their non-ownership in the gas processing plant or the receipt of any revenue from the extracted by-products at the plant.[3] Damages were assessed against Exxon for underpayment of royalties based upon the difference between the net realization method of accounting and the BTU adjusted method which the Secretary had historically determined was appropriate.

On appeal,[4] a majority of a three-judge panel of the Court of Appeals reversed the District Court's judgment

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[3] Only Supron owned by Lybrook Plant for a short period of time between 1974-76, during which time the Secretary billed Supron for royalty based on the net realization method which included the value of extracted by-products for royalty value purposes.

[4] The Secretary elected not to appeal the District Court's requirement of dual accounting for Producer Defendants who owned no interest in Extraction Plants and received no revenue from extracted by-products. Rather, the Secretary argued that it had independently exercised its administrative discretion to require *all* lessees to dually account for Indian royalties. As pointed out in

on February 24, 1984, as to the obligation of Exxon and the other Producer Defendants to dually account, holding that the lease provisions and the regulations were clear and had been construed by the Secretary from 1950 to 1979, without exception and without variation, to require dual accounting only in instances where the lessee owned the processing plant or received additional revenue from the by-products extracted at the plant. 728 F.2d at 1558 (Jt. App. 24a). The three-judge panel further held that there was no abuse of discretion by the Secretary in determining the royalty which had in fact been billed to and paid by Exxon and the other Producer Defendants and that there was no indication of any action by the Secretary in the record which could be characterized as arbitrary or capricious. 728 F.2d 1560 (Jt. App. 29a). Ultimately, the three-judge panel concluded that there was "no basis for the trial court's determination as to fiduciary standards." 728 F.2d at 1560. (Jt. App. 30a).

On rehearing, the Court of Appeals issued an *en banc* opinion on January 23, 1986, wherein it reversed the panel decision and adopted the dissenting opinion of Judge Seymour who had emphasized, without comment, that "the Secretary has adopted the view that interpreting the royalty terms to require dual accounting by the Jicarilla's lessees is reasonable" and "in accoordance, so far as it goes, with the trial court's holding" 728 F.2d at 1566 (Jt. App. 43a). In fact, the Secretary's change in interpretation was compelled by the District Court's Order (Jt. App. 139a) and was not voluntary at all. Petitioner Exxon seeks review of the *en banc* opinion and judgment of the Tenth Circuit.

Judge Seth's dissenting opinion in the Court of Appeals *en banc* decision, filed January 23, 1986, the leases involved in this action are the only Indian or public land leases in the country where dual accounting is required by the Secretary for non-plant owner lessees. (Jt. App. 12a-13a) In addition, the Secretary's recently proposed regulations do not require dual accounting as ordered by the *en banc* decision of the Court of Appeals. (Jt. App. 357a, 370a-374a).

REASONS FOR GRANTING THE WRIT

I. In establishing a specific fiduciary duty on the part of the Secretary to always maximize royalties payable to the Indians, the Tenth Circuit fails to recognize the United States Supreme Court's mandate in *Mitchell II* that the contours of any fiduciary duty be clearly established by a statute or regulation.

The Tenth Circuit, sitting *en banc*, found that the Secretary breached his fiduciary duty to the Tribe because the Secretary did not interpret the oil and gas leases and pertinent regulations so as to maximize immediate royalties for the Tribe. 728 F.2d at 1569 (Jt. App. at 48a). The Tenth Circuit relies on *United States v. Mitchell*, 463 U.S. 206 (1983) [*Mitchell II*] but incorrectly applies the principles of *Mitchell II* and possibly misconstrues the holding of *Mitchell II*.

Mitchell II holds that there is no context specific fiduciary duty to the Indians absent a statute or regulation which clearly establishes the fiduciary duty and "*define*[*s*] *the contours*" of the fiduciary responsibilities applicable to the particular situation [emphasis added]. *Id.* at 224. Contrary to *Mitchell II*, the Tenth Circuit imposed a special fiduciary duty upon the Secretary to interpret the lease and regulations so as to maximize immediate royalties to the Tribe without pointing to any statute or regulation which specifically defines the contours of the fiduciary duty as requiring an immediate maximization of royalties.

Prior to *Mitchell II*, this Court in *United States v. Mitchell*, 445 U.S. 535 (1980) [*Mitchell I*], held that the General Allotment Act created only a limited trust relationship between the United States and individual Indian allottees, which did not impose any duty upon the government to manage timber resources. *Id.* at 542. In *Mitchell II*, on the other hand, the Supreme Court held that certain other statutes did establish a fiduciary

responsibility on the part of the United States to manage Indian timber resources. *Mitchell II*, *supra* at 225. The Court stated that "a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians." *Id.* The Court described the Secretary's role in the sale of timber from Indian lands as "pervasive." *Id.* at 219. The distinction between the statutory framework which did create a fiduciary obligation on the part of the Secretary to manage Indian timber resources in *Mitchell II*, and the statutory framework which did not create such an obligation in *Mitchell I*, was the degree of control over Indian timber resources granted to the government by each of the two different sets of statutes.

The Secretary exercises far less control over oil and gas resources on Indian lands than he does over timber resources. Whereas the Secretary has total control over the management of unallotted Indian timber resources, 25 U.S.C.S. § 406(a) (1983), he exercises only supervisory and regulatory control over Indian management of unallotted Indian oil and gas resources. 25 U.S.C.S. § 396a *et seq.* (1983).

Unlike the "pervasive" control exercised by the Secretary in managing timber resources, Indians exercise significant control over the management and exploitation of their oil and gas resources. The leasing of unallotted Indian lands for mining purposes, including oil and gas, is initiated by the tribal council or other authorized spokesman for the Indians. 25 U.S.C.S. § 396a. While leases are subject to approval by the Secretary, *id.*, following the initial decision to grant oil and gas leases, the Indians retain a significant role in making and supervising such leases. Although leases are generally sold according to standard procedures prescribed by the Secretary for public lands in general, a lease may be made by private negotiations with the consent of the tribal council or other governing tribal authorities. 25 U.S.C.S. § 396b.

Furthermore, the Court in *Mitchell II* was able to point to specific statutes and regulations which defined the contours of the Secretary's duty to the Tribe in managing timber resources. For example, the Court pointed to § 8 of the 1910 Act, as amended, which "expressly mandates that sales of timber from Indian trust lands be based upon the Secretary's consideration of the 'needs and best interests of the Indian owner and his heirs' and that proceeds from such sale be paid to owners 'or disposed of for their benefit,' and that the government has specifically recognized its duties in 'managing the Indian forests so as to obtain the greatest revenue for the Indians consistent with a proper protection and improvement of the forests.' " *Mitchell II*, *supra* at 220, citing 25 U.S.C.S. § 406(a) and U.S. Office of Indian Affairs, Regulations and Instructions for Officers in Charge of Forests on Indian Reservations 4 (1911). No such statutes or regulations exist which require the Secretary to interpret regulations such as 30 C.F.R. § 221.50 (1981), a regulation which applies to calculating royalties on *all* public lands, not just Indian lands,[5] in such a way as to maximize immediate royalties to the Indians to the exclusion of other lessors. In *Nevada v. United States*, 463 U.S. 110 (1983), this court specifically held:

> The government does not "compromise" its obligation to one interest that Congress obliges it to represent by the mere fact that it simultaneously performs another task for another interest that Congress has obliged it by statute to do.

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[5] 30 C.F.R. Part 221 (Jt. App. 238a) applies to *all* public lands, not just Indian lands, yet the Tenth Circuit interprets 30 C.F.R. § 221.50 as requiring the Secretary to choose the accounting method which maximizes immediate royalties to the Indians, 728 F.2d at 1568 (Jt. App. 47a-48a), in effect discriminating against non-Indian lessors. As Judge Seth noted in his dissent to the per curiam opinion, "these are the *only* Indian or public lands in the country where dual accounting is required." 782 F.2d at 861 (Jt. App. 13a).

Id. at 128. Indeed, the Secretary must consider *all* of his obligations, not just those that solely benefit the Indians as the Tenth Circuit now holds.

In *Montana v. Blackfeet Tribe of Indians*, 471 U.S. ——, 85 L.Ed.2d 753, 105 S.Ct. —— (1985), this Court delineated the three goals of the 1938 Mineral Leasing Act as follows:

> As the Court of Appeals recognized, Congress had three major goals in adopting the 1938 Act: (i) to achieve "uniformity so far as practicable of the law relating to the leasing of tribal lands for mining purposes," S. Rep. 2; HR. Rep. 1872, 75th Cong. 3rd Sess., 1 (1938); (ii) to "bring all mineral leasing matters in harmony with the Indian Reorganization Act," S. Rep. 3; HR. Rep. No. 1872, *supra*, at ——, and (iii) to ensure that Indians receive "the greatest return from their property." S. Rep. 2; HR. Rep. No. 1872, *supra*, at ——. 85 L.Ed.2d at 760 n. 5.

Id. 85 L.Ed.2d at 760, n. 5. The Tenth Circuit's *en banc* decision does not advance any of the above-referenced goals. Firstly, no uniformity is established since the Jicarilla Apache Reservation is the only tribal land where dual accounting is imposed on all lessees. See Judge Seth's dissent, 782 F.2d at 861 (Jt. App. 12a). Secondly, the decision does not tend to "bring all mineral leasing matters in harmony with the Indian Reorganization Act." Congress passed the Indian Reorganization Act to facilitate the Indians' ability to compete in the private business world. F. Cohen, *Handbook of Federal Indian Law*, 325 (1982 ed.). The Tenth Circuit's *en banc* opinion actually places the Tribe at a competitive disadvantage. *See* discussion of same *infra* at Part VII. Thirdly, the Tenth Circuit's *en banc* decision does not insure that Indians receive "the greatest return from their property." Considering only the short-term maximization of revenue does not necessarily insure long-term maximization of revenue. *See* discussion of same *infra* at Part II. Indeed, the legislative history does not impose a duty upon the Secretary

to interpret the leases and regulations as requiring short-term royalty maximization, to the exclusion of all other considerations. Before such a duty is required, *Mitchell II* requires that Congress "clearly establish" such a duty. *Id.*, 463 U.S. at 225.

Since a grant of certiorari is appropriate in cases in which a Court of Appeals has misconstrued, misapplied or misconceived an applicable Supreme Court opinion, it it appropriate in this case in light of the Tenth Circuit's misconception and misapplication of the principles in *Mitchell II*. *See, Schlude v. Commisisoner*, 372 U.S. 128, 130 (1963), and *Wilkinson v. United States*, 365 U.S. 399, 401 (1961).

II. The Tenth Circuit's application of the principles set forth in *Mitchell I* and *Mitchell II* substantially and materially differ from the application given the same principles by the United States Claims Court.

In *Navajo Tribe of Indians v. United States*, 9 Cl. Ct. 336 (1986), the Court of Claims reiterated the standards set forth by it in *United States v. Mitchell*, 229 Cl. Ct. 9, 664 F.2d 265 (1981), whereby the Secretary's actions were to be judged by

> [t]he normal standards for government fiduciaries were their actions in good faith and within the realm of their acceptable discretion, or were they arbitrary, capricious, an abuse of discretion, or contrary to law?

Id., 664 F.2d at 274. The Court equated the "prudent man standard", essentially a "negligence standard", to the "arbitrary and capricious" standard as the proper standard for reviewing the Secretary's actions:

> Defendant's conduct relative to this claim should be measured generally by the standard applicable to private trustees. In managing the trust, a trustee is required to use "the care, skill, prudence and diligence of an ordinarily prudent man engaged in

> similar business affairs and with objectives similar to those of the trust in question" [citation omitted]. *Essentially, this is a negligence standard. Under the circumstances of this claim, the Court would reach the same result using an arbitrary and capricious standard* [emphasis added].

Navajo Tribe of Indians, supra at 390. This Court applied the same principle in *United States v. Mason*, 412 U.S. 391 (1973), holding that a private fiduciary and, consequently, the government when acting as an Indian trustee, must exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property. *Id.* 412 U.S. at 398.

The Claims Court in *Navajo Tribe of Indians, supra*, further held that while the government is generally held subject to a fiduciary duty in its management of Indian property, "*the United States does not have a general obligation to maximize income from tribual resources* [emphasis added]". *Id.* at 412. The Court cited an earlier case, *Navajo Tribe v. United States*, 610 F.2d 766 (Ct. Cl. 1979), in which the Court held:

> There is no general obligation, as distinct from an express obligation imposed by statute, agreement, or the like, for the government to make the plaintiff's property productive . . .

Navajo Tribe of Indians, supra, 9 Ct. Cl. at 412, citing 610 F.2d at 768.

In the 1986 *Navajo* case, the Court also noted that the same rule was followed by the Indian Claims Commission in *Blackfeet and Gros Ventre Tribes of Indians v. United States*, 32 Ind. Cl. Comm. 65, 77 (1973), in which the Commission held that there was no general law that requires the government to administer Indian lands for profit at all. *Navajo Tribe of Indians, supra*, 9 Ct. Cl. at 412, footnote 73.

In *Navajo Tribe of Indians v. United States*, 9 Ct. Cl. 227 (1985), the Claims Court recognized that immediate revenue maximation may conflict with the goal of long term maximation of return on the Indian resources. The Claims Court held that it was within the Secretary's discretion to fail to charge rental fees for prospecting for minerals on tribal lands, since charging rental fees merely to prospect would have discouraged mineral prospecting and thereby reduced the net return on Indian mineral resources. *Id.* at 242. Similarly, the Claims Court in *Yankton Sioux Tribe v. United States*, 623 F.2d 159 (Ct. Cl. 1980), held that mere evidence that the trustee received less than market value for trust property, without more, does not even establish negligence or other breach on the part of the trustee. *Id.* at 164. Furthermore, the fiduciary's performance of his duties must be evaluated at the time he acted, rather than judging the ideal course of action with the benefit of hindsight. *Navajo Tribe of Indians, supra*, 9 Ct. Cl. at 261; *accord Nance v. Environmental Protection Agency*, 645 F.2d 701, 711 (9th Cir. 1981).

In the present case, the Tenth Circuit simply states that the Secretary failed to fulfill his fiduciary obligations by failing to interpret the leases and pertinent regulations so as to maximize immediate royalty income for the Tribe. 728 F.2d at 1569 (Jt. App. 48a). The Tenth Circuit does not state the standard by which the fiduciary conduct of the Secretary was judged, nor does it make any attempt to evaluate the Secretary's conduct in the context of the time at which the Secretary acted.

The Tenth Circuit's refusal to apply the prudent man standard in judging the Secretary's conduct, and its finding that the Secretary had a positive duty to interpret the leases and regulations so as to maximize immediate royalties to the Tribe, absent a specific regulation or statute requiring such a duty, conflicts with the precedent established by the Court of Claims, and is proper

for review by this Court. *See, United States v. Hopkins*, 427 U.S. 123, 124, 49 L.Ed.2d 361, 96 S.Ct. 2588 (1976); *Commissioner v. Idaho Power Co.*, 418 U.S. 1, 41 L.Ed.2d 535, 94 S.Ct. 2757 (1974).

III. The Tenth Circuit's standard of review of the Secretary's actions, which, to the exclusion of all other considerations, looks only at whether or not the Secretary maximized immediate royalties to the Indians, is contrary to the standard of review set forth in 5 U.S.C.S. § 706(2)(A), the standard of review enunciated by the United States Supreme Court in *Udall v. Tallman* and that enunciated in other Circuit Court cases.

Congress has declared that a court may set aside agency action only upon a finding that the action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C.S. § 706(2)(A). While this statement in and of itself is not that illuminating, Supreme Court cases and Circuit Court cases clearly articulate the proper standard of review. For example, this Court, in *Udall v. Tallman*, 380 U.S. 1 (1965), discussed at length the standard for reviewing the Secretary's interpretation of statutes and regulations. Specifically, this Court held:

> When faced with a problem of statutory construction, this Court shows great deference to the interpretations given the statute by officers or agents charged with its administration. 'To sustain the Commission's application of this statutory term, *we need not find that its construction is the only reasonable one*, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings. [citations omitted] . . . *When the consruction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order.* . . . [The] ultimate criterion is the administrative interpretation, which becomes of controlling weight, unless it is plainly erroneous, or inconsistent with the regulation' [citation omitted] [emphasis added].

Id. at 16. The Supreme Court in *Udall, supra,* put great emphasis on the fact that the regulation at issue had been given a consistent construction by the Secretary or a long period of time:

> If not the only reasonable construction of the Act, it is at least an admissible one. It therefor comes within the rule that the practical construction given to an Act of Congress, fairly susceptible of different constructions, by those charged with the duty of executing it is entitled to great respect and, *if acted upon for a number of years, will not be disturbed except for cogent reasons* [emphasis added].

Id. at 18.

The facts in the instant case are similar to those in *Udall* in that: (1) the Secretary's construction of the regulations and leases was reasonable, as is conceded by the Tenth Circuit, 728 F.2d at 1569 (Jt. App. 48a), (2) the construction was consistent for approximately 25 years, 728 F.2d at 1558 (Jt. App. 24a), and (3) the Secretary's construction was relied upon by lessees throughout that period. Applying the principles of this Court in *Udall,* the Secretary's construction of the leases and regulations should have been upheld.

As this Court stated in *Badderton v. Frances,* 432 U.S. 416 (1977), when Congress entrusts the head of an administrative agency the primary responsibility for interpreting statutory terms, the reviewing court is not free to set aside that agency's actions simply because the court would have interpreted the statute in a different manner. *Id.* at 425. More recently, in *Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana,* 472 U.S. ——, 86 L.Ed.2d 168, 105 S.Ct. —— (1985), this Court held that the Secretary's long accepted interpretation of Section 17 of the Pueblo Lands Act, 43 Stat. 636 (1924), was "entitled to very great respect." *Id.* 86 L.Ed. 2d at 182. The Secretary's interpretation was upheld despite the dissent's argument that "when faced with two

such conflicting interpretations, courts must resolve ambiguities in favor of preserving Indian rights and safeguards." *Id.* 86 L.Ed.2d at 197, n. 66. The Tenth Circuit's *en banc* opinion adopts a similar argument of Judge Seymour.

The Ninth Circuit in *Continental Oil Co. v. United States*, 184 F.2d 802 (9th Cir. 1950) specifically recognized the realm of discretion accorded the Secretary of the Interior when he has been granted the power to fix the value of gas for royalty purposes. *Id.* at 821. Specifically, the Court held:

> [The Secretary of the Interior's] determination is valid in the absence of fraud or mistakes so gross as to imply bad faith.

Id.

In *Morris v. Andrus*, 593 F.2d 851 (9th Cir. 1978), the Ninth Circuit pointed out that the district court in that case correctly noted that courts "give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute," quoting *Investment Co. Institute v. Camp*, 401 U.S. 617, 626-27 (1971). *Morris, supra* at 853. Indeed, the Ninth Circuit has consistently held that in reviewing decisions of the Secretary, the court exercises a limited standard of review and cannot merely substitute its judgment for that of the Secretary. *Melluzzo v. Watt*, 674 F.2d 819, 820 (9th Cir. 1982). *Baker v. United States*, 613 F.2d 224, 226 (9th Cir. 1980), cert denied, 449 U.S. 932 (1980). Rather, "great deference is shown to an administrative agency's interpretation of the law which it is charged with administering." *Ramstad v. Hodel*, 756 F.2d 1279 (9th Cir. 1985).

In light of the Tenth Circuit's finding that "the Secretary's construction of the royalty regulation is reasonable" (Jt. App. 48a), and its refusal to accept that construction, the Tenth Circuit employs a standard of

review in direct conflict with Supreme Court cases and other Circuit Court cases that have discussed the standard for reviewing the Secretary's actions.

The Tenth Circuit, too, prior to its current decision, has held, in accordance with the Supreme Court and other Circuit Court decisions, that a court cannot substitute its discretion for that of the Secretary. *United States v. Ohio Oil Co.*, 163 F.2d 633 (10th Cir. 1947). In *Ohio Oil Co.*, the oil and gas leases executed by the United States under the Mineral Leasing Act authorized the Secretary to determine the reasonable minimum value of royalty oil. *Id.* at 641. The Court held:

> The trial court did not base its findings of arbitrariness on the record adduced before the Secretary, but conducted an independent hearing for the purpose of determining for itself the reasonable value of the oil in question. We do not think the trial court was at liberty to disregard or ignore the factual basis upon which the Secretary proceeded, nor was it at liberty to substitute its concept of value for that of the Secretary. *We should remember that the contract authorized the Secretary, not the Court, to determine the reasonable minimum value of the royalty oil.* [emphasis added].

Id. As in *Ohio Oil Co.*, the leases in our case also authorized the Secretary to determine the amount of royalty to be paid on the leases. (Jt. App. 379a).

The fact that the Tenth Circuit in this case made a specific finding that the Secretary of the Interior's action was reasonable based upon the regulations, but yet substituted its discretion for that of the Secretary, creates a departure from the usual course of judicial proceedings and this Court's power of supervision is called upon pursuant to Supreme Court Rule 17.1(a).

IV. The Tenth Circuit's standard of review which considers only whether or not the Secretary maximized immediate royalties to the Indians should either be reversed or clarified because of its importance in the management of both public lands and Indian lands, and because it is inconsistent with the Secretary's long-standing interpretation of the pertinent regulations.

The Claims Court has recognized that an immediate revenue maximization may conflict with the goal of long term maximization of return on the Indian's resources. *Navajo Tribe of Indians v. United States*, 9 C.Ct. 227, 242 (1985). See discussion of same *supra* at Part 2. Similarly, the District Court of California, in *Pan American Petroleum Corp. v. Udall*, 192 F.Supp. 626 (D.Cal. 1961), held that it was wrong for the Secretary to require an oil and gas lessee adjacent to an Indian reservation to pay the Indian/lessors compensatory royalties in an amount based on 100% of the production of the lessees' wells. *Id.* at 629. The Court held that the Secretary's actions were arbitrary and capricious even though the Secretary had chosen the alternative that maximized the immediate profits to the Indians because the Secretary did so at the expense of the adjoining lessees. *Id.* at 629-630.

Congress has granted the Secretary the power to promulgate the regulations relating to leases on Indian lands. 25 U.S.C.S. § 396d. Clearly, the Tenth Circuit is not the proper body to make a decision as to what is in the best interest of the Indian tribes. The Tenth Circuit does not have the data or expertise to make decisions reserved for the Secretary by Congress. Congress passed the Indian Reorganization Act to enhance the ability of the Indian tribes to do business in their local communities by increasing the confidence of private parties doing business with an Indian tribe. F. Cohen, *Cohen's Handbook of Federal Indian Law*, 325-326 (1982 ed.). The Tenth Circuit's decision declares that the Secretary must, in all cases, act to maximize royalties for the Tribe, without re-

gard to any other considerations, when resolving disputes involving, or making rules governing, tribal business. 728 F.2d at 1566-1567 (Jt. App. 42a, 44a). This standard necessarily increases the risk perceived by a party doing business with an Indian tribe. If the Tenth Circuit's decision is allowed to stand, the relationship between the Indian tribes and third parties doing business with the Indian tribes will be jeopardized. Since the Tenth Circuit's decision is of utmost importance to the utilization of the public lands, it is proper for this Court to grant this Petition for Writ of Certiorari. *See, United States v. Coleman*, 390 U.S. 599, 601 (1968).

Another reason this case is important for consideration by this Court is that from 1950 to 1979, the Secretary construed the pertinent lease provisions and regulations as requiring "dual accounting" not by all lessees, but only in instances where the lessee had an interest in gas processing plants, or received additional compensation for the sale of "wet" gas. 728 F.2d at 1558 (Jt. App. 24a). Since the Tenth Circuit's decision below is inconsistent with the well-established construction given the pertinent regulations for almost 25 years by the administrative agent charged with their enforcement, this Court's grant of Petitioner's writ of Certiorari is appropriate. *See, Morton v. Ruiz*, 415 U.S. 199, 201-202 (1974).

V. The Tenth Circuit's affirmation of the District Court's mandate requiring the Secretary to apply dual accounting, both prospectively and retroactively, violates the well-established rule enunciated in various Circuit Courts that such a change should have only prospective effect.

The Tenth Circuit affirmed the District Court's Order compelling the Secretary to effect, retroactively, an interpretation of both 25 C.F.R. § 211.13 and 30 C.F.R. § 221.50, as well as the leases, contrary to the interpretation given to the leases and regulations by the Secretary

for approximately 25 years. 479 F. Supp. 549-551 (Jt. App. 126a-131a). The Secretary's change in policy necessarily embraces royalty accounting procedures for all oil and gas producers holding leases on the Reservation, including Petitioner Exxon's herein.

The District Court's decision in this case prompted the Secretary to issue its Order compelling dual accounting, both retroactively and prospectively, as to *all* producers on the Reservation, whether owners of processing plants or not. (Jt. App. 139a). Due to the new interpretation of the leases and regulations mandated by the District Court, all oil and gas producers holding leases on the Reservation are now subject to dual accounting even if the lessee owns no interest in a processing plant.

Although the Tenth Circuit places substantial reliance on the Secretary's ostensible "change of mind", 728 F.2d at 1566 (Jt. App. 43a), it is clear that it was the District Court's mandate that prompted the Secretary's change in policy. As Judge Seth in his dissent to the *en banc* decision issued by the Tenth Circuit notes, the Secretary's change in policy was anything but voluntary. As Judge Seth states in his dissent to the *en banc* opinion:

> Again, there is no administrative record to support such a change. The conclusion must be reached that the change was not an administrative change but was brought about by the trial court's order.

782 F.2d at 861 (Jt. App. 12a-13a).

Also, the Associate Solicitor's letter of July 20, 1981 points out the involuntary nature of the change as does the IBLA opinion rendered in *Supron Energy Corp. et al*, 46 IBLA 181 (March 21, 1980),[6] which states:

> [w]e would be constrained to affirm the Area Supervisor's decision in view of the interim holding of the

[6] This administrative appeal involved only the obligation of Supron to dually account for royalties during the short period of time that it owned the Lybrook Plant.

> United States District Court for the District of New Mexico . . ., which *inter alia*, orders Supron to utilize the dual accounting system.

(Jt. App. 194a).

The Ninth Circuit in *Continental Oil Co., supra*, a case directly on point, specifically recognized that when a court mandates a change in the Secretary's method of computing royalties, at a higher price, such a change should have prospective operation only. *Id.*, 184 F.2d at 821. Similarly, in *McDonald v. Watt*, 653 F.2d 1035 (5th Cir. 1981), the Fifth Circuit held that the Secretary's change in interpretation of regulations relating to oil and gas lease applicants constituted a new rule established through an adjudication. *Id.* at 1042. The Fifth Circuit, however, held that since the old rule had been reasonably relied upon, the new rule should be given prospective effect only. *Id.* It was an abuse of discretion for the Secretary to apply the new rule to those who were not parties to the administrative adjudication establishing the new rule. *Id. Accord, Retail, Wholesale & Department Store Union v. NLRB*, 466 F.2d 380 (D.C. Cir. 1972); *SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

The Tenth Circuit itself held in *Stewart Capital Corp. v. Andrus*, 701 F.2d 846 (10th Cir. 1983), that where a new rule is established by the Secretary and constitutes an abrupt departure from a well-established practice, such a rule should only have prospective effect. *Id.* at 848. This is particularly true where a party against whom the new rule is applied relied extensively on the former rule. *Id.* Indeed, reliance seems to be the all important factor in determining that a new rule should only have prospective effect. *Buccaneer Point Estates, Inc. v. U.S.*, 729 F.2d 1297, 1299 (11th Cir. 1984). As the District of Columbia Circuit recently stated:

> [A]n agency may not impose liability retroactively when the individual has acted in accordance with the agency's own announced interpretation of the statute.

International Union, United Automobile, Aerospace & Agricultural Implement Workers of America v. Brock, 783 F.2d 237, 248 (D.C. Cir. 1986).

It is undisputed that for approximately 25 years the Secretary required that lessees who did not own processing plants should account for royalties based only upon the BTU method of accounting. 728 F.2d at 1558 (Jt. App. 24a). When the Secretary, in accordance with the District Court's mandate, began to apply the dual accounting method to lessees who did not operate processing plants, the Secretary significantly departed from his previous practice. This retroactive application of a new rule, despite reliance by Petitioner Exxon on the old rule for many years, violates the well-established rule that such a change should only have prospective application.

VI. The Tenth Circuit's affirmation of the District Court's review of the Secretary's action with respect to Petitioner Exxon, absent any administrative record with a reasoned analysis as to why dual accounting should or should not be applied to Petitioner Exxon, violates well-established principles of administrative law.

When the Secretary began requiring *all* lessees on the Reservation to pay royalties based upon the dual accounting method, there was no administrative record documenting the reasons for such a change. See Judge Seth's dissent. 782 F.2d at 861 (Jt. App. 12a-13a). Later, there was an administrative adjudication which determined that *Supron*, during the time period it owned an interest in the Lybrook Plant, was subject to dual accounting. *Supron Energy Corporation, et al.*, 46 IBLA 181 (March 21, 1980). *See* footnote 6 above. There *is* no administrative record which a court can review to determine whether the agency abused its discretion with respect to the other non-plant owner lessees, including Petitioner Exxon.

In *Motor Vehicle Manufacturer's Assoc. v. State Farm Mutual*, 463 U.S. 29 (1983), this Court invalidated such

agency action reasoning that an agency may not change a settled course of behavior without cogently explaining why it has departed from its normal procedure:

> *There are no findings and no analysis here to justify the choice made, no indication of the basis on which the* [agency] exercised its expert discretion. *We are not prepared to, and the Administrative Procedure Act will not permit us to, accept such . . . practice* . . . Expert discretion is the lifeblood of the administrative process, but, "unless we make the requirements for administrative action strict and demanding, expertise, the strength of the modern Government, can become a monster which rules with no practical limits on its discretion." [Citation omitted] [emphasis added].

Id. at 48. This Court further held that:

> A "settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is then, at least, a presumption that those policies will be carried out best if the settled rule is adhered to. *Atchison, T. & S.F. R. Co. v. Wichita Board of Trade*, 412 U.S. 800, 807-808 (1973). Accordingly, an agency changing its course by rescinding a rule is *obligated to supply a reasoned analysis* for the change beyond that which may be required when an agency does not act in the first instance [emphasis added].

Id. at 41-42.

As Judge Seth stated in his dissent to the Tenth Circuit's *en banc* opinion:

> If the Secretary independently came to a decision to require dual accounting and to so change the long construction of the lease and regulations it was necessary for him to articulate the reasons for the change.

782 F.2d 855 (Jt. App. 12a-13a). Since there is no administrative record for review by a court with respect

to Petitioner Exxon, the Tenth Circuit's review of the District Court's mandate requiring the Secretary to apply dual accounting to *all* lessees on the Reservation, retroactively and prospectively, constitutes a dramatic departure from well-established administrative law principles. Hence, the District Court's review of the Secretary's action with respect to Petitioner Exxon, absent any administrative record with a reasoned analysis as to why dual accounting should or should not be applied to Petitioner Exxon, should not be allowed to stand.

VII. The Tenth Circuit has enunciated a standard of review which allows a court to substitute its discretion for that of an administrative agency in violation of the separation of powers doctrine.

In the present case, neither of the lower courts has made a finding that the Secretary of the Interior acted arbitrarily or capriciously or otherwise in violation of 5 U.S.C.S. § 706(2)(A). 728 F.2d at 1558 (Jt. App. 25a). In fact, the Tenth Circuit specifically found that the Secretary's decision with regard to accounting of royalties was reasonable. 728 F.2d at 1569 (Jt. App. 48a). The District Court, nevertheless, substituted its discretion for that of the Secretary in direct violation of 5 U.S.C.S. § 706(2)(A).

In *Securities and Exchange Commission v. Chenery Corporation*, 332 U.S. 194 (1947) [*Chenery II*], this Court held that:

> [A] simple but fundamental rule of administrative law . . . is . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely on the grounds invoked by the agency. If those grounds are inadequate or improper, *the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain*

> *which Congress has set aside exclusively for the administrative agency* [emphasis added].

Id. at 196. *Accord, Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 169 (1962). Indeed, when Congress provides a specific mechanism for a court to review agencies decisions, and the court reviews an agency's decision without adhering to the mechanism provided by Congress, the separation of powers doctrine upon which our government is founded is threatened.

In *Public Service Commission v. Havemeyer*, 296 U.S. 506 (1936), this Court warned a lower court that it is not to substitute its own views for that of an agency because, in so doing, this court is performing legislative, executive, and administrative functions. *Id.* at 517-518. Additionally, this Court has held that for a court to upset an accounting order, the accounting method being employed must be "so entirely at odds with the fundamental principles of correct accounting . . . as to be the expression of a whim rather than an exercise of judgment." *United States v. New York Telegraph Co.*, 326 U.S. 638 (1944).

The lower courts and the Department of the Interior were both established by Congress, and Congress has provided a specific mechanism pursuant to which courts may review an agency's actions upon a determination that those actions are arbitrary and capricious. 5 U.S.C.S. § 706(2)(A). If the action of the agency is within an area which Congress has entrusted to the agency, a court may not set aside a decision of the agency because it would have reached a different result, nor is the court empowered to do so. As this Court stated in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 104 S.Ct. 2778, 52 USLW 4845 (1984), citing both *Chenery II, supra* and *Udall v. Tallman, supra*:

> If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. *If*, however, *the court determines Con-*

> *gress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an* administrative *interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute* [emphasis added].

Id., 52 USLW at 4847. Since neither 30 C.F.R. 221.50 nor 25 C.F.R. 211.13 specifically requires the Secretary to maximize immediate royalty to the Indians, nor has Congress clearly expressed this intention, the Secretary's interpretation should stand in light of the Tenth Circuit's finding that the Secretary's interpretation was reasonable. 728 F.2d at 1555 (Jt. App. 48a).

The Jicarilla Apache Tribe is itself organized pursuant to Congressional statute. 25 U.S.C.S. §§ 476-479 (1983). In passing this Act, Congress intended to allow the tribes a certain amount of freedom to enter and compete in the private business world. F. Cohen, *Cohen's Handbook of Federal Indian Law*, 325 (1982 Ed.). This Congressional purpose was hindered by the fact that creditors were reluctant to deal with tribes in the fear that tribal sovereign immunity would prevent the enforcement of contracts. *Id.* To resolve this problem, Congress authorized the tribes to organize into separate entities. One, a political governing body to exercise the powers of self-government pursuant to § 16 of the Indian Reorganization Act and two, a tribal corporation to engage in business transactions pursuant to § 17 of the same Act. *Id.* Likewise, Congress determined that the Secretary had the expertise to decide matters concerning the Indians. 43 U.S.C.S. § 1457 (1981). Nevertheless, the Tenth Circuit, in adopting Judge Seymour's opinion in the District Court, determined that "given two reasonable interpretations, Interior's trust responsibilities required it to apply whichever accounting method [BTU or net realization] yields the Tribe the greatest royalty." 728 F.2d at 1555 (Jt. App.

48a). This determination was made after a determination that the Secretary's own interpretation of the regulation was reasonable. *Id.*

The majority of the Tenth Circuit made no attempt to deal with the complexities which the Secretary may have faced in interpreting the regulations, but simply substituted its discretion for that of the Secretary. For example, if the Secretary had, as the majority now requires, required dual accounting of all lessees, this may have discouraged potential lessees without any interest in a gas processing plant from buying oil and gas leases on the Reservation. This, in turn, might have decreased competition in bidding for oil and gas leases, and thereby reduced the price of such leases, lowering the net returns to the Tribe on their oil and gas resources. Furthermore, if the Secretary had required dual accounting of all lessees only on tribal lands, as the District Court has ordered, this would have made neighboring public lands more attractive than the Reservation to lessees.

By substituting its discretion for that of the Secretary, and by requiring that the Secretary consider *only* whether or not his interpretation maximized immediate royalties to the Indians, the Tenth Circuit violated the separaration of powers doctrine as enunciated by this Court in *Chenery II*, *supra*, and this Court's grant of Petitioner's Writ is appropriate.

VIII. The Tenth Circuit's decision to afford the Tribe a remedy against innocent lessees as a result of an alleged breach of trust by the Secretary is in direct conflict with the United States Supreme Court decision in *Nevada v. United States*.

In *Nevada v. United States*, 463 U.S. 110 (1983), the Supreme Court determined that where the government breaches its fiduciary duty to an Indian tribe, the tribe's sole remedy lies against the government. *Id.* at 144, Note 16. In *Nevada*, the United States and Paiute tribe in-

stituted a water rights claim against certain third parties, claiming that an earlier decision regarding the water rights should be invalidated as the United States had breached its fiduciary duty to the tribe during the prior litigation. In the relevant portion of the opinion, the Supreme Court held:

> If in carrying out their role as representatives, the Government violated its obligations to the Tribe, then the Tribe's remedy is against the Government, not against third parties.

Id.

Clearly, Petitioner Exxon is a third party within the meaning of *Nevada* and therefore the claim against it is improper. Although the Tenth Circuit uses *Nevada* in its analysis of the liability issue, it completely misconstrues *Nevada* by allowing the imposition of liability against Petitioner Exxon which is predicated solely on the Secretary's alleged breach of his fiduciary duty to the Tribe. 479 F. Supp. at 549 (Jt. App. 126a-127a).

This Court's grant of Petitioner's Writ of Certiorari is proper since the Tenth Circuit has misconstrued the Supreme Court's holding in *Nevada*. *See, Schlude, supra*, 372 U.S. at 130; *Wilkinson, supra*, 365 U.S. at 401.

IX. The Tenth Circuit's decision to impose liability upon innocent third parties is in direct conflict with a long-standing principle of equity which has been specifically recognized by this Court and other Circuit Courts of Appeal.

The Tenth Circuit's decision is in direct conflict with the long-standing principle of equity regarding the liability of a third party who is involved in a breach of trust. Regarding a third party's liability for a breach of a fiduciary with whom he is dealing, the question is always "whether he had actual knowledge that a breach was being committed . . ." Bogert, *Trusts & Trustees* § 901, 262 (2d ed. rev. 1982). Both the Third Circuit and

Fourth Circuit have recognized that a third party must know that a fiduciary is breaching his trust in his dealings with the third party in order for that third party to be liable to the beneficiary for the breach of trust. *Matter of Quantum Development Corp.*, 534 F.2d 532, 540 (3rd Cir. 1975); *American Surety Co. v. First National Bank*, 141 F.2d 411, 413 (4th Cir. 1944). *See also* Restatement (Second) of Trusts § 326 (1959).

This long-standing rule of equity has been expressly applied by this Court to fiduciary dealings between the Federal Government and Indian tribes. *See Seminole Nation v. United States*, 316 U.S. 286, 295 (1942); *United States v. Dann*, 470 U.S. ——, 84 L.Ed.2d 28, 36, 106 S.Ct. —— (1985). In the instant case, the District Court made no finding that Petitioner or any of the lessees knew of the Government's breach of its fiduciary duty, and in fact found that:

> If the Secretary has breached its fiduciary duty [to the Tribe] . . . then the Defendants have in fact breached the terms of the lease, *albeit through no apparent fault of their own.* [emphasis added]

479 F. Supp. at 549 (Jt. App. 126a-127a).

The Tenth Circuit's holding not only violates notions of justice and fair play by holding an innocent party liable for the acts of a wrong-doer, it also defeats one of the most important policies behind the use of fiduciaries. Fiduciaries are used by a variety of persons and entities to represent that person or entity in its dealings with third parties regarding defined interests or properties. The appointment of a fiduciary is usually a practical matter of convenience. The trustee is directed to administer the interests in order to substitute its supposedly superior judgment for that of the beneficiary. 89 C.J.S. *Trusts* § 9, 721 (1955). In return, third persons who deal with a fiduciary demand some certainty that the fiduciary's acts wi" be binding upon the beneficiary with respect to that third party.

Absent a showing of Petitioner's knowledge of the Secretary's alleged breach of fiduciary duty, Petitioner has done nothing to breach the lease and should not be liable. The Tenth Circuit's decision is in direct conflict with the long-standing principle of equity and the Tribe's sole remedy should lie against its fiduciary, the Secretary. Since the Tenth Circuit's decision jeopardlizes the relationship between third party lessees dealing with Indian lands via the Secretary, this Court's supervision and direction is proper. *See, Morton v. Ruiz, supra,* 415 U.S. at 201-202.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the *en banc* judgment and opinion of the Tenth Circuit.

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